

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**Boston Edison Company, Cambridge Electric
Light Company, Commonwealth Electric
Company, d/b/a NSTAR Electric**

D.T.E. 03-121

**OPPOSITION OF THE ATTORNEY GENERAL TO THE NE DG COALITION'S
MOTION TO DISMISS**

I. INTRODUCTION

American DG, Inc., Aegis Energy Services, Inc., Office Power, L.L.C., Equity Office Properties Trust, Inc., Northern Power Systems, Inc., Real Energy, Inc., Tecogen Inc., and Turbosteam Corporation (collectively the "NE DG Coalition") have asked the Department of Telecommunications and Energy ("Department") to dismiss the January 16, 2004 petition of Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Company, d/b/a NSTAR Electric ("NSTAR" or the "Company"). The petition seeks approval of tariffs designed to establish cost-based standby rates for large and medium sized commercial and industrial customers who have their own on-site, self-generation facilities.

In support of its Motion, the NE DG Coalition claims that the Company's proposed standby rates violate Department precedent and regulations and regulations promulgated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Public Utilities Regulatory Policy Act ("PURPA"). In the alternative, the NE DG Coalition asks the Department to: (1) issue a finding that NSTAR's filing is not a proper tariff filing, and (2) consider the filing as a petition for a generic investigation of standby rates.

II. STANDARD OF REVIEW

A party may move for dismissal as to all issues in a case at any time after the filing of an

initial pleading. 220 C.M.R. § 1.06(6)(e). The Department has a high threshold for prevailing on a motion to dismiss. *See Riverside Steam & Electric Company*, D.P.U. 88-123, pp. 26-27 (1988) (“*Riverside*”); *Cambridge Electric Light Company and Massachusetts Institute of Technology*, D.P.U. 94-101/95-36, p. 10 (1995) (“*Cambridge*”). “[T]he Department must find that NSTAR is not entitled to relief under any facts that could be proved in support of their filing.” *NSTAR*, D.T.E. 03-47, p. 7 (2003); *City of Waltham*, D.T.E. 02-11, p. 2 (2002). In determining whether to grant a motion to dismiss, the Department takes the assertions of fact in the petition as true and construes them in favor of the non-moving party. *Riverside Steam & Electric Company*, D.P.U. 88-123, pp. 26-27. “The Department in the past has shown reluctance to dismiss a case before the petitioner at least has had an opportunity to present and support its case through discovery and evidentiary hearing.” *NSTAR*, D.T.E. 03-47, p. 7 *citing Riverside*, D.P.U. 88-123, p. 26.

III. ARGUMENT

The Department should deny the NE DG Coalition’s motion to dismiss the Company’s petition because the Coalition has not established that NSTAR is not entitled to relief under any facts that could be proved in support of its filing. The Company’s petition has raised many issues best examined in the context of a full evidentiary hearing process.

A. The Company’s Proposed Standby Rates Do Not Violate Department Precedent.

The NE DG Coalition argues that the Department established legal standards for standby, maintenance and supplemental rates in *Cambridge Electric Light Company*, D.P.U. 94-101/95-36 (1995) and that NSTAR’s proposed standby rates “on their face violate those standards.”

Motion, p. 4. The NE DG Coalition further maintains that not only did *Cambridge* “establish clear precedent for standby rates, but also those standards are legally binding on Cambridge Electric Light Company and Boston Edison Company, who were parties to the adjudicatory proceeding.” *Id.*

The clear language of the Department’s decision undermines the NE DG Coalition’s argument. In fact, the Department recognized that while it had previously approved rates for standby service on a case-by-case basis,¹ **“there was no established Department precedent in this area.”** *Cambridge*, D.P.U. 94-101/95-36, pp. 46-47 (Emphasis added). The Department did not establish new standards for approving rates for standby service in *Cambridge*. Rather, it determined the reasonableness of Cambridge Electric’s and MIT’s proposed standby rates and maintenance and supplemental rates guided by the Department’s well established rate structure goals - efficiency, simplicity, continuity, fairness and earnings stability. *Id.*, p. 47.

The NE DG Coalition further argues that the Company is attempting to relitigate the standards for standby rates set forth in *Cambridge*. Even if the Department had set clear standards for the design of rates for standby service in *Cambridge*, the electric industry in Massachusetts has undergone a restructuring process since the Department decided *Cambridge*. The structure and pricing of rates for standby service may need to take different forms in the post-restructured electric industry. These changes in the electric industry require the Department to reevaluate the various methodologies used to set standby rates in the past. The Department’s decisions are not irreversible and the judicial doctrine of *res judicata* does not apply. *See Boston*

¹ “[T]he specific structure of the rates varied from company to company.” D.P.U. 94-101/95-36, p. 46.

Gas Company v. Department of Public Utilities, 367 Mass. 92, 104 (1975).

There is no basis for the Department to conclude that NSTAR's proposed rates violate its earlier decisions.

B. The NE DG Coalition's Arguments Indicate That There Is A Factual and Policy Dispute With NSTAR.

The NE DG Coalition further attacks the NSTAR filing as being unlawful because it claims: (1) the Company based the rates on contract demand as opposed to actual demand (Motion, p. 4); (2) the Company based its standby rates on rate schedules applicable to all requirements contracts as opposed to class specific data (Motion, p. 6); and (3) the proposed rates are designed to recover transmission and distribution rates through a demand charge rather than a variable charge.

The NE DG Coalition, however, does not support its characterization of NSTAR's filing with citation to any facts on the record in this case. There clearly is a factual dispute over the basis of the proposed rates and a policy dispute concerning the appropriate methodology to use when calculating standby rates. The NE DG Coalition's factual and policy disagreement with NSTAR does not render the filing "unlawful." The Department should not deny NSTAR a hearing on its filing just because the NE DG Coalition may disagree with its methodology.

C. The Proposed Standby Rates Do Not Violate Department or Federal Regulations.

The NE DG Coalition also claims the Company's petition violates Department and FERC regulations relating to Qualifying Facilities ("QFs"). The NE DG Coalition claims that QF facilities are entitled to take service under the rates available to all-requirements customers and to the extent that the proposed rates are intended to supplant the availability of all-requirements

rates to standby customers, they violate Department and Federal regulations. Motion, p. 10.

However, the NE DG Coalition does not cite any evidence from the record or any legal precedent in support these claims. In fact, the Department's regulations only apply to very small QF units and are not intended to permit large customers, the class to which the proposed rates apply, to avoid standby rates. *See* 220 C.M.R. 8.06(1). Rather, the Department's regulations are designed to ensure that standby rates are cost-based and non-discriminatory. As the Department noted in *Cambridge, supra*, it has wide latitude under PURPA and has the authority to determine whether rates for the sale of electricity to QFs are just and reasonable and that "such a determination is factual in nature and cannot be determined as a matter of law." *See Cambridge*, pp. 15-16.

The Department should not rely on unsupported statements as it considers the validity of the Company's proposed standby rates under Department or federal regulations. The NE DG Coalition's arguments identify factual disputes it has with the Company's petition and highlight issues to explore during the hearing process. They do not form the basis of dismissing the petition, however.

D. The NE DG Coalition's Request For Alternative Relief Is Inappropriate.

If the Department does not dismiss the Company's petition, then the NE DG Coalition asks: "that the Department (1) issue a finding that NSTAR Electric's filing is not a proper tariff filing; and (2) consider the filing as a petition for generic investigation of standby rates pursuant to the Department's order in D.T.E. 02-38." Motion, p. 16. In support of this request, the NE DG Coalition compares this case to *New England Telephone and Telegraph*, D.P.U. 85-85 (1985) and an interlocutory decision in D.P.U. 94-50 (May 24, 1994). Neither of these cases are

applicable here.

In *New England Telephone and Telegraph*, the Department dismissed the tariff containing rates for intraLATA service because it was still examining general policy issues related to intraLATA competition, which had not yet been authorized and for which there were no potential buyers. D.P.U. 85-85, p. 6. However, unlike the tariff for intraLATA service in *New England Telephone and Telegraph*, the Department already has approved tariffs for standby service. *Cambridge*, pp. 49-54; *Nantucket Electric Company*, 88-161/168, p. 227 (1989). In the interlocutory decision, the Department dismissed a proposal for alternative regulation filed by New England Telephone and Telegraph Company because the filing was not a tariff filing. D.P.U. 94-50, p. 14 (Interlocutory Order dated May 24, 1994). The same cannot be said of this current filing.

NSTAR is entitled to a hearing on its proposed standby rates. The Department should proceed according to the existing procedural schedule. The NE DG Coalition should not be allowed to delay this proceeding and the implementation of reasonable standby rates by NSTAR. Nearly two years have passed since the Department opened its investigation into distributed generation in docket D.T.E. 02-38 and the important issue of standby rates has not been resolved. NSTAR has made this filing pursuant to G.L. c. 164, § 94, and the Department's ability to suspend the Company's tariffs is limited. G.L. c. 25, § 18. *See Boston Edison Company*, D.P.U. 906, p. 167 (1982). Consistent with precedent, the Department should move forward and resolve the issue of the reasonableness of the proposed standby rates. *Cambridge*, p. 46.

IV. CONCLUSION

For these reasons, the Department should deny the NE DG Coalition's motion to dismiss NSTAR's petition and proceed with its investigation according to the established procedural schedule.

RESPECTFULLY SUBMITTED,

THOMAS F. REILLY
ATTORNEY GENERAL

By: _____
Colleen McConnell
Joseph W. Rogers
Assistant Attorneys General
Utilities Division
200 Portland Street, Fourth Floor
Boston, MA 02114
(617) 727-2200

Date: February 24, 2004